

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the parties filed both a Stipulation and an Agreed Stipulation with the Division of Workers Compensation on March 18, 2013. At oral argument, the parties agreed: (1) they were not appealing the Award in Docket Nos. 1,051,428 and 1,051,429; (2) they were not appealing the ALJ's finding in Docket No. 1,051,430 that claimant sustained a left knee injury by accident arising out of and in the course of his employment with respondent and that he has a 15% left lower extremity permanent functional impairment; (3) in Docket No. 1,051,431, if the Board finds claimant sustained a right knee injury arising out of and in the course of his employment with respondent, claimant sustained a 5% right lower extremity permanent functional impairment; and (4) in the Award, under Docket No. 1,051,430, the ALJ should have added the language "less any amounts previously paid" at the end of the last paragraph on page 16.

Following oral argument, on July 29, 2013, the parties entered into a written stipulation that claimant received \$72,220.35 in temporary total disability (TTD) benefits and that respondent was alleging an overpayment of \$5,566.40 due to the incorrect TTD rate that was paid. The written stipulation also indicated that ALJ Sanders' finding that claimant was overpaid three weeks of TTD from December 7, 2011, through December 27, 2011, at the rate of \$529 per week for a total overpayment of \$1,587 and that respondent was entitled to a credit for the same was no longer an issue.

ISSUES

In Docket No. 1,051,430 (March 25, 2009, date of accident), ALJ Sanders awarded claimant TTD benefits (103.14 weeks at \$529 per week and 22.86 weeks at \$772.53 per week) and a 15% functional impairment for the left knee. In Docket No. 1,051,431 (the ALJ found the date of accident in this claim is June 30, 2010), the ALJ awarded claimant a 5% functional impairment for the right knee.

The ALJ denied respondent's request for a credit for TTD benefits paid at the Missouri compensation rate (\$772.53). As indicated above, the ALJ granted respondent a credit of \$1,587 for an overpayment of TTD benefits.

Respondent maintains all of claimant's functional impairment arose out of his March 25, 2009, accident, which is the subject of Docket No. 1,051,430. Respondent argues that claimant's right knee injury did not arise out of and in the course of his employment. Finally, respondent contends it is entitled to a credit for an overpayment of TTD benefits in the amount of \$5,566.40.

Claimant asserts his right knee injury arose out of and in the course of his employment with respondent. Claimant maintains the ALJ correctly found that respondent was not entitled to a credit for overpayment of TTD benefits paid at the Missouri compensation rate.

The issues before the Board on this appeal are:

1. In Docket No. 1,051,430, is respondent entitled to a credit for an overpayment of TTD in the amount of \$5,566.40 because it paid claimant the maximum weekly benefit rate allowed under Missouri law instead of the lower maximum weekly benefit rate under Kansas law?

2. In Docket No. 1,051,431, did claimant prove by a preponderance of the evidence that he sustained a right knee injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Docket No. 1,051,428 and Docket No. 1,051,429

The Board will not set forth findings of fact in these two dockets as the parties agreed not to contest the ALJ's findings that these two claims are not compensable.

Docket No. 1,051,430

Claimant filed his Application for Hearing on July 2, 2010, alleging he injured his left knee on March 25, 2009, when he slipped and fell at work. At the time, claimant was working in Ottawa, Kansas, but was a community leader and spent 25% of his time assisting at several stores in Missouri. On March 25, 2009, claimant slipped and fell at an Independence, Missouri, store, injuring both knees. Claimant testified he continued working while on crutches and received his full salary. He then received workers compensation benefits of approximately \$773 per week, the maximum allowed under Missouri law.¹ After that accident, claimant underwent three left knee surgeries, all of which were paid for by respondent. At the regular hearing, respondent indicated that all TTD benefits it paid to claimant were paid under Docket No. 1,051,430.

On July 29, 2013, the parties entered into a written stipulation that provided, in part:

1. Claimant was paid temporary total disability compensation from 6/9/09 to 7/7/09 and from 8/27/09 to 1/04/10 (22.85708 weeks) at the weekly rate of \$772.53 for a total of \$17,657.79.
2. Claimant was paid temporary total disability from 1/5/10 to 12/27/11 (103.14285 weeks) at the weekly rate of \$529.00 per week for a total of \$54,562.56.
3. In all, claimant received \$72,220.35 in temporary total disability benefits.
4. Respondent alleges there is an overpayment of temporary total disability benefits of \$5,566.40 due to the incorrect rate that was paid, but claimant contends that respondent is not entitled to a credit for the alleged overpayment.²

Steve Wagner, a claims team leader for Sedgwick, a third-party administrator, was in charge of respondent's Kansas workers compensation claims. He testified claimant was

¹ R.H. Trans. at 27.

² Stipulation to Overpayment of Temporary Total Disability Compensation at 1-2.

paid the maximum TTD rate under Missouri law because claimant's March 25, 2009, accident occurred in Missouri. When it became apparent claimant was pursuing a Kansas claim, the TTD payments were reduced to \$529 per week.

Docket No. 1,051,431

Claimant filed his Application for Hearing on June 30, 2010, alleging he injured both knees from March 26, 2009, to August 25, 2009, from repetitively walking floors, stocking and standing at work. From March 25, 2009, until taken off work in June 2009, claimant worked for respondent while on crutches. The ALJ found claimant's date of accident was June 30, 2010, which neither party disputed. Claimant testified that both knees were swollen and the doctors took him off work. August 24 or 25, 2009, was the last day claimant worked for respondent. The ALJ implicitly found claimant suffered a right knee injury by accident arising out of and in the course of his employment with respondent and determined that claimant had a 5% right lower extremity permanent functional impairment.

Dr. Stephen W. Munns

Dr. Munns did not treat claimant's right lower extremity, nor did his records reflect that claimant made any complaints about his right lower extremity.

Dr. Daniel D. Zimmerman

At the request of his attorney, claimant was evaluated by Dr. Zimmerman on March 12, 2012. The history taken by Dr. Zimmerman indicated claimant had five left knee operations and one right knee operation. Using the *Guides*,³ Dr. Zimmerman opined claimant had a 10% functional impairment to the right lower extremity at the level of the knee. Dr. Zimmerman opined that claimant's right knee injury was due to repetitive trauma resulting from protecting his left knee and working on hard floors for extended hours during an average workweek. He testified he did not know of any specific event that occurred to cause claimant's right knee injury. Dr. Zimmerman indicated claimant's right knee surgery took place before 2009.

Dr. Peter V. Bieri

Pursuant to ALJ Sanders' July 3, 2012, Order, claimant underwent an independent medical evaluation by Dr. Bieri on September 11, 2012. Dr. Bieri did not testify in this matter. Dr. Bieri's report indicated he reviewed an April 10, 2007, operative report by Dr. Randall concerning claimant's right knee. However, later in his report, Dr. Bieri noted claimant had an April 10, 2009, right knee surgery. Dr. Bieri's report indicates claimant was

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

asked specifically if he had injured the right knee, and claimant responded by stating his right knee symptoms came on because of a poor result from left knee surgery. Dr. Bieri opined claimant would have a 5% functional impairment to the right lower extremity as the result of patellofemoral pain. Dr. Bieri stated at page 6 of his September 11, 2012, report:

Based on history and documentation, I cannot state, within reasonable medical probability, that the claimant suffered any specific injury to the right knee. It is possible this may be due to "over compensation," but the primary records of Dr. Randall fail to truly substantiate this.

PRINCIPLES OF LAW AND ANALYSIS

1. In Docket No. 1,051,430, is respondent entitled to a credit for an overpayment of TTD in the amount of \$5,566.40 because it paid claimant the maximum weekly benefit rate allowed under Missouri law instead of the lower maximum weekly benefit rate under Kansas law?

K.S.A. 44-525(c) provides:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

Claimant asserts the ALJ correctly determined that she had no jurisdiction to grant respondent a credit for an overpayment of TTD pursuant to K.S.A. 44-525(c). K.S.A. 44-525 provides that in the event the employee has been overpaid TTD benefits and the employee is entitled to additional disability benefits, an ALJ shall provide for the application of a credit against such benefits. Not only does the ALJ have authority to grant respondent a credit for the overpayment of TTD benefits, the ALJ is required to do so. Claimant filed this claim in Kansas and, by doing so, asserted that Kansas has jurisdiction over him and this claim. This claim was tried under the Kansas Workers Compensation Act. The maximum weekly TTD benefit at the time of claimant's accident under Kansas law was \$529. Therefore, the Board finds that respondent is entitled to a credit for overpayment of TTD in the amounts of \$5,566.40 and \$1,587, for a total of \$7,153.40, in accordance with K.S.A. 44-525(c).

There is an issue as to whether the credit for overpayment of TTD should be applied to Docket No. 1,051,430, to Docket No. 1,051,431, or first applied to one and then the other. Respondent indicated at the regular hearing that all TTD was paid under Docket No. 1,051,430. Claimant testified that his right knee surgery occurred prior to March 25, 2009, and that he had three left knee surgeries after March 25, 2009. The record indicates TTD

benefits were paid to claimant when he was off work due to the left knee injury in Docket No. 1,051,430. Therefore, the TTD overpayment shall be applied as a credit only in that claim.

2. In Docket No. 1,051,431, did claimant prove by a preponderance of the evidence that he sustained a right knee injury by accident arising out of and in the course of his employment?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.⁴ A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”⁵ The phrase “arising out of” employment requires some causal connection between the injury and the employment.⁶ The existence, nature and extent of the disability of an injured workman is a question of fact.⁷ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.⁸

Claimant alleges that repetitively walking floors, stocking and standing at work caused his right knee injury. From March 25, 2009, until taken off work in June 2009, claimant worked for respondent while on crutches. From the record, it is evident that claimant is a credible witness. Dr. Zimmerman opined claimant’s right knee injury was due to repetitive trauma resulting from protecting his left knee and working on hard floors for extended hours during an average workweek. Respondent asserts claimant did not complain to Dr. Munns of a right knee injury. However, Dr. Munns indicated he treated only claimant’s left knee injury. Respondent next argues that Dr. Bieri, the court-appointed IME physician, opined claimant’s right knee injury was not causally related to his work activities. Dr. Bieri stated in his report that he could not state within reasonable medical probability that claimant suffered any specific injury to the right knee. That is different than opining that claimant’s right knee injury was not the result of his work activities. Simply put, claimant proved by a preponderance of the evidence that he sustained a right knee injury by accident arising out of and in the course of his employment.

⁴ K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁷ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

⁸ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

CONCLUSION

1. In Docket No. 1,051,430, respondent is entitled to a credit for an overpayment of TTD benefits in the amount of \$5,566.40 because respondent paid claimant 22.85708 weeks of TTD at the maximum weekly benefit rate allowed under Missouri law instead of the lower maximum weekly benefit rate under Kansas law. Respondent is also allowed a credit for three weeks of TTD in December 2011 in the amount of \$1,587. Thus, respondent is entitled to a \$7,153.40 credit for an overpayment of TTD benefits.

2. In Docket No. 1,051,431, claimant proved by a preponderance of the evidence that he sustained a right knee injury by accident arising out of and in the course of his employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board:

1. Affirms the April 4, 2013, Award entered by ALJ Sanders in Docket Nos. 1,051,428 and 1,051,429.

2. Modifies the April 4, 2013, Award entered by ALJ Sanders in Docket No. 1,051,430, as follows:

Pursuant to the parties' July 29, 2013, written stipulation regarding temporary total disability compensation, claimant received 22.85708 weeks of temporary total disability benefits at the rate of \$772.53 per week in the amount of \$17,657.79, and an additional 103.14285 weeks of temporary total disability benefits at the rate of \$529 per week in the amount of \$54,562.56, for a total amount of temporary total disability benefits of \$72,220.35. Claimant is entitled to receive 11.10 weeks of permanent partial disability benefits at the rate of \$529 per week in the amount of \$5,871.90, for a 15% loss of use of the left leg.

Claimant was overpaid \$5,566.40 in temporary total disability benefits covering a period of 22.85708 weeks from June 9, 2009, to July 7, 2009, and from August 27, 2009, to January 4, 2010, and \$1,587 in temporary total disability benefits covering three weeks from December 7, 2011, through December 27, 2011, for a total overpayment of temporary

⁹ K.S.A. 2012 Supp. 44-555c(k).

total disability benefits in the amount of \$7,153.40. Pursuant to K.S.A. 44-525, said overpayment first will be credited against the permanent partial disability benefits that are due and owing claimant and then against the temporary total disability benefits claimant received. Therefore, respondent is given a credit of \$5,871.90 against claimant's permanent partial disability benefits. Respondent shall be given an additional credit of \$1,281.50 (\$7,153.40 minus \$5,871.90) against the temporary total disability benefits previously received by claimant. After deducting the overpayment credits, claimant is entitled to receive \$70,938.85 (\$78,092.25 minus \$7,153.40), which is all due and owing, less any amounts previously paid.

3. Affirms the April 4, 2013, Award entered by ALJ Sanders in Docket No. 1,051,431.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge